

United States
Circuit Court of Appeals ⁷
For the Ninth Circuit.

SUNSET TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. A. HOSHOR and EDNA R. HOSHOR, Husband
and Wife,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the Western District of Washington,
Southern Division.

FILED

NOV 30 1917

F. D. MONGKTON,
CLERK.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint	3
Answer to Amended Complaint	9
Assignment of Errors.....	49
Attorneys, Names and Addresses of.....	1
Bond on Writ of Error.....	52
Certificate of Clerk of United States District Court to Original Exhibits	44
Certificate of Clerk of United States District Court to Transcript of Record.....	57
Certificate of District Judge to Bill of Excep- tions, etc.	43
Citation on Writ of Error (Copy).....	56
Citation on Writ of Error (Original).....	61
Empanelment of the Jury	9
EXHIBITS:	
Plaintiff's Exhibit No. 2—Photograph....	46
Defendant's Exhibit "A"—Pole Record of City of Tacoma	48
Instructions	35
Journal Order Extending Term	18
Judgment	13
Motion for Directed Verdict.....	33
Names and Addresses of Attorneys.....	1
Order Allowing Writ of Error.....	54

Index.	Page
'Order Concerning Transmission of Original Exhibits to Circuit Court of Appeals.....	18
Order Denying Motion for New Trial.....	13
Order Directing Original Exhibits Instead of Copies Forwarded Circuit Court of Appeals	16
Order Extending Term	19
Order Extending Time to and Including September 5, 1917, to Prepare and Serve Bill of Exceptions	19
Order for Removal to the United States District Court	8
Petition for New Trial	10
Petition for Writ of Error	49
Praecipe for Transcript of Record.....	1
Statement of Facts and Bill of Exceptions.....	20
Stipulation Re Bill of Exceptions and Statement of Facts, etc.	42
Stipulation Regarding 'Original Exhibits.....	17
Stipulation Regarding Transcript of Record..	15
Stipulation to Forward Original Exhibits to Circuit Court of Appeals	16
TESTIMONY ON BEHALF OF PLAINTIFFS:	
COVER, L. C.	26
DUNTON, EDWARD MILES	24
GRAHAM, EMMA E.	25
HOSHOR, EDNA R.	20
HOSHOR, J. A.	21
In Rebuttal	32

Index. Page

TESTIMONY ON BEHALF OF DEFEND- ANT:	
COLLINS, B. W.	31
DUNPHY, JAMES P.	27
HOSHOR, J. A. (In rebuttal).....	32
PETERSON, S. V.	29
PERKINS, E. E.	32
RICHARDS, FRANK	30
TAYLOR, A. B.	29
TAYLOR, MORTON L.	26
YOCOM, Dr. JAMES R.	32
Verdict	10
Writ of Error (Copy)	55
Writ of Error (Original)	59

Names and Addresses of Attorneys.

CHARLES O. BATES, Esquire, National Realty Building, Tacoma, Washington,

CHARLES T. PETERSON, Esquire, National Realty Building, Tacoma, Washington,
Attorneys for Plaintiff in Error.

M. J. GORDON, Esquire, National Realty Building, Tacoma, Washington,

J. H. EASTERDAY, Esquire, National Realty Building, Tacoma, Washington,
Attorneys for Defendants in Error. [1*]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1752.

J. A. HOSHOR and EDNA R. HOSHOR, Husband and Wife,

Plaintiffs,

vs.

SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-named Court:

You will please prepare and certify, to constitute the record on appeal of the above-entitled cause,

*Page-number appearing at foot of page of original certified Transcript of Record.

2 *Sunset Telephone and Telegraph Company*

typewritten copies of the following papers, omitting all captions, excepting the caption to the amended complaint, omitting all verifications, acceptances of service, file-marks and other endorsements, said transcript of record to be certified and forwarded to and filed in the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, to be printed there according to the rules of said Circuit Court of Appeals:

1. This praecipe.
2. Amended complaint.
3. Order of removal from State court.
4. Answer of defendant to amended complaint.
5. Impaneling of the jury.
6. Verdict of the jury.
7. Petition for new trial.
8. Order denying petition for new trial.
9. Judgment.
10. Stipulation as to the record.
11. Stipulation to forward original exhibits to Circuit Court of Appeals.
12. Order to forward original exhibits to Circuit Court of Appeals.
13. All orders extending the term and extending time.
14. Bill of exceptions. [2]
15. Petition for writ of error.
16. Assignment of errors.
17. Bond and approval.
18. Order allowing writ of error.
19. The writ of error.

20. Citation in error.
21. Clerk's certificate.

CHARLES O. BATES,
CHARLES T. PETERSON,
Attorneys for Defendant.

Dated October 2d, A. D. 1917.

(Filed October 8, 1917.) [3]

*In the Superior Court of the State of Washington,
in and for Pierce County.*

No. 1752.

J. A. HOSHOR and EDNA R. HOSHOR, Husband
and Wife,

Plaintiffs,

vs.

SUNSET TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Defendant.

Amended Complaint.

Plaintiffs complaining of the above-named defendant, respectfully allege and show to the Court:

I.

That at all the times hereinafter mentioned, J. A. Hoshor and Edna R. Hoshor, plaintiffs above named, were and still are husband and wife.

II.

That at all the times hereinafter mentioned defendant Sunset Telephone and Telegraph Company, was a corporation organized and existing under and by virtue of the laws of the State of California, and owning and operating various telephone and tele-

4 *Sunset Telephone and Telegraph Company*

graph lines in the State of Washington, and doing business in the State of Washington conformably to the laws thereof pertaining to foreign corporations doing business therein, and having offices and agents for the transaction of its business at and in the city of Tacoma, in Pierce County, Washington. [4]

III.

That Sixth Avenue in the city of Tacoma, Pierce County, State of Washington, is and at all the times hereinafter mentioned was a public highway and at the point and place hereinafter mentioned was an open and generally travelled street and highway of and in said city.

IV.

That at a point or place on said Sixth Avenue opposite or nearly opposite the garage of the Hotel Hesperides in the vicinity of Titlow Beach near the west end of said street and avenue, the defendant on or about the 18th day of September, 1913, and for upwards of one year prior thereto had and maintained a pole erected for the purpose of carrying and holding two electric wires of the city of Tacoma, which wires were a part of said city's lighting system, and also for the purpose of holding, carrying and maintaining eight wires of defendant Sunset Telephone & Telegraph Company, which last-named wires were a part of said defendant Sunset Telephone & Telegraph Company's telephone and telegraph system.

That said pole was so erected and maintained under and pursuant to some arrangement or agreement between the defendant and said city, the exact

nature of which is unknown to plaintiffs.

That said pole was about forty (40) feet in height above the ground and imbedded in the ground some four or five feet. That from a point near the top thereof was attached a guy wire so-called, composed in part of wires some three-eighths of an inch in diameter, and also of an iron rod or bar some ten (10) feet in length and one (1) inch in diameter, to the ends of which said wires were fastened or attached, so that said rod formed a part of such guy wire; and the other, or ground end of said guy wire was anchored [5] or tied to a stump situated on the opposite side of said street or avenue from said pole, so that said guy wire and rod herein mentioned extended over and across said Sixth Avenue aforesaid, and pedestrians and others travelling said street and avenue at said point were required to pass or go under the same; the purpose of said guy wire being to hold and sustain said pole in an upright position.

V.

That in the exercise of due and ordinary care it was and became the duty of the defendant to properly and firmly fasten and secure said guy wire at the ground end thereof, and thereafter to cause the same to be seasonably inspected for the purpose of determining that the same was securely fastened and was firm and secure in its position, nevertheless, so it is, that the defendant suffered and permitted said guy wire to be loosely and insecurely fastened or tied to the stump in the preceding paragraph hereof mentioned, and so loosely and insecurely fastened as

6 *Sunset Telephone and Telegraph Company*

that the weight of said wire and the attending jar caused and produced by traffic upon said street and avenue, caused the same to become unloosened and unfastened on or about the 18th day of September, 1913, and at a time when plaintiff Edna R. Hoshor, lawfully travelling along said street and avenue, was passing thereunder, and as a result of said guy wire becoming unfastened and detached from the stump hereinbefore referred to, said guy wire and the iron bar in part composing it, fell with a great force upon the plaintiff, Edna R. Hoshor, knocking her to the ground and severely and seriously injuring her as hereinafter more particularly stated.

VI.

That as a result of the guy wire falling upon and against said plaintiff, Edna R. Hoshor, as mentioned and set forth [6] in the preceding paragraph hereof, she was made sick, sore and lame and disabled as follows, namely: she was struck by said guy wire and rod across her back and shoulders, knocked violently down, striking her head upon the ground with great force, as a consequence of which she was rendered unconscious for a brief interval; she was bruised and injured in the region of the left scapula and in the small of her back and upon her head and arms, and her nervous system was shocked and deranged. That in consequence of said injuries she was necessarily confined to her bed for a period of approximately five weeks; the shock and injury caused and produced impaired monthly periods and irregular menstruation, followed by extreme nervousness, emaciation and falling off in weight; also a

permanent weakness of the genital and interior organs of her body. That her injuries are permanent and in consequence of the same she will be permanently disabled and prevented from performing her customary work as housekeeper and housewife, and as a further consequence thereof she has become and will remain disabled to bear children, and the natural period of her life has been shortened and abridged. That by reason of said injuries she was caused to suffer great physical pain and mental anguish and will continue to suffer therefrom for an indefinite period hereafter.

That as a further result of said injuries plaintiffs were obliged to employ physicians, surgeons and nurses for the care and attention of the plaintiff, Edna R. Hoshor, at a reasonable cost and expenditure of Three Hundred Dollars (\$300.00), and will be obliged to incur additional cost and expense of like kind and character in the future, the extent of which cannot at this time be definitely stated, all to plaintiffs' damage in the sum of Ten Thousand Dollars (\$10,000).

WHEREFORE, plaintiffs demand judgment against the [7] defendant in the sum of Ten Thousand Dollars (\$10,000.00), besides the costs and disbursements of this action.

GORDON & EASTERDAY and
A. H. GARRETSON,

Attorneys for Plaintiffs.

(Filed February 11, 1915.) [8]

Order for Removal to the United States District Court.

Now, on this 9th day of January, A. D. 1915, this cause came on for hearing upon the application of the defendant herein for an order transferring this cause to the United States District Court for the Western District of Washington, Southern Division, the plaintiffs appearing by Gordon & Easterday, their attorneys, and the defendants appearing by Bates, Peer & Peterson, its attorneys, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned, with good and sufficient surety, as provided by law, and it further appearing to the Court that notice of the filing of said petition and bond was duly given to the above-named plaintiffs before the filing of the same, and that this is a proper cause for removal to said District Court,—

IT IS THEREFORE BY THE COURT ORDERED AND ADJUDGED that this cause be, and it is hereby removed to the United States District Court for the Western District of Washington, Southern Division, and the clerk is hereby directed to make up the record in said cause for transmission to said Court.

C. M. EASTERDAY,
Judge.

(Filed February 6, 1915.) [9]

Answer to Amended Complaint.

Comes now the above-named defendant, and for answer to the amended complaint herein,—

I.

Admits the allegations contained in the first, second and third paragraphs of said complaint.

II.

Denies each and every allegation contained in the fourth paragraph of said complaint.

III.

Denies each and every allegation contained in the fifth paragraph of said complaint.

IV.

Denies each and every allegation contained in the sixth paragraph of said complaint.

V.

Denies each and every allegation contained in the seventh paragraph of said complaint.

WHEREFORE, this defendant having fully answered said amended complaint prays that this action may be dismissed, and that it may recover its costs.

BATES, PEER & PETERSON,
Attorneys for Defendant,

Office and Postoffice Address, 1107 Nat'l Realty
Building, Tacoma, Washington.

(Filed March 15, 1915.) [10]

Empanellment of the Jury.

At a regular session of the United States District Court for the Western District of Washington,

10 *Sunset Telephone and Telegraph Company*

Southern Division, held at Tacoma on the 26th day of June, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

This cause coming on regularly at this time for trial, the plaintiffs appearing by their attorney M. J. Gordon, and the defendant being represented by C. O. Bates, and Chas. T. Peterson, a jury being ordered, the following named persons answered to their names, and were duly sworn, examined and empanelled as the jury in this cause:

S. D. Simons.	Robert Weisbach.
I. A. Johnson.	C. S. Blair.
Charles Baumbach.	E. A. Nichols.
A. E. Green.	Frank E. Bender.
A. M. Goddard.	E. M. Thomas.
J. C. Sudderth.	G. M. Gunderson. [11]

Verdict.

We, the jury empanelled in the above-entitled cause, find for the plaintiffs and assess their damages at the sum of Thirty-seven Hundred Fifty Dollars (\$3750.00).

A. M. GODDARD,
Foreman.

(Filed June 28, 1917.) [12]

Petition for New Trial.

Comes now defendant, Sunset Telephone and Telegraph Company, and petitions the Court to grant a

new trial herein for the following causes materially affecting the substantial rights of the defendant:

I.

The jury awarded plaintiff excessive damages, the same appearing to have been given under the influence of passion or prejudice.

II.

Insufficiency of the evidence to justify the verdict of the jury.

The evidence is wholly insufficient to show that the pole line in question was an agency or instrumentality in the possession of or under the control of defendant.

The evidence is wholly insufficient to show that there was any duty on the part of defendant to make any inspection, or to exercise any care in the maintenance of the guy line in question, the falling of which it is claimed caused the injuries.

The evidence is wholly insufficient to show that the manner in which the guy line was attached to the cedar stump referred to in the complaint and in the testimony, was not a proper or safe means of securing the same.

The evidence was wholly insufficient to show that if there was any defect in the manner of fastening the guy wire to the stump that a reasonable inspection would have disclosed such defect.

The evidence is wholly insufficient to show that the defendant [13] exercised control, or had any right to exercise control over the guy line in question, the falling of which it is claimed caused plaintiff's injuries.

The evidence is wholly insufficient to show the violation or neglect on the part of defendant of any legal duty toward plaintiff.

The evidence was wholly insufficient on plaintiff's theory of the case, or under any theory of law, to submit the question of defendant's negligence to the jury, or to support the verdict against defendant.

III.

Error in law occurring at the trial, which error was duly excepted to at the time.

The Court erred in failing and refusing to rule, as a matter of law, that under the evidence defendant was a mere licensee in the use of the pole line and guy wire in question, and that it did not have any control over the same, and that defendant was under no legal duty to inspect the same, or keep the same in repair.

The Court erred in ruling under the evidence that it was defendant's duty to keep said guy line in repair, and erred in ruling that it was defendant's duty to inspect the same for the purpose of discovering defects therein, for the reason that the testimony affirmatively showed that the guy line in question was an instrumentality possessed and controlled exclusively by the city of Tacoma.

The Court erred in refusing to grant defendant's motion for a directed verdict, and for a dismissal of plaintiffs' action, made at the close of all of the testimony.

The Court erred in submitting the question of defendant's negligence under the evidence to the jury.

The Court erred in charging the jury wherein it instructed the jury that even though the wires of defendant were on a pole owned by the city of Tacoma, that it was the duty of defendant to exercise ordinary care to keep the guy wire supporting such pole in repair, and that it was the duty of defendant to make reasonable inspection of such pole and guy wire, which charge was duly excepted to by defendant at the time.

CHARLES O. BATES,
CHARLES T. PETERSON,
Attorneys for Defendant.

(Filed August 9, 1917.) [15]

Order Denying Motion for New Trial.

This cause coming on to be heard on this 20th day of August, 1917, upon defendant's motion for new trial, and the Court having heard the argument of counsel and being advised, denies said motion, to which ruling defendant excepts, and its exception is allowed.

Done in open court this 20th day of August, 1917.

EDWARD E. CUSHMAN,
Judge.

(Filed August 20, 1917.) [16]

Judgment.

At the regular February, 1917, term of said Court, —present the Hon. EDWARD E. CUSHMAN, presiding Judge.

This cause coming on regularly for trial upon the

14 *Sunset Telephone and Telegraph Company*

26th day of June, 1917, pursuant to assignment, the plaintiffs appearing in person and by Gordon & Easterday, their attorneys; Messrs. Bates & Peterson appearing as attorneys for defendant; both parties being ready for trial a jury was duly impanelled and sworn to try the issues, and the respective parties having introduced their evidence and rested, the arguments of counsel having been heard, the jury duly instructed by the Court retired, and

Thereafter on the 28th day of June, 1917, returned into court a verdict finding in favor of the plaintiffs, J. A. Hoshor and Edna R. Hoshor, and against the defendant, Sunset Telephone and Telegraph Company, a corporation, in the sum of Thirty-seven Hundred and Fifty Dollars (\$3750.00), which verdict was duly received and entered of record, and

Thereafter on the 20th day of August, 1917, said cause came on to be heard upon the motion of the defendant for a judgment notwithstanding the verdict of the jury, which motion was denied; and the motion and petition of the defendant for a new trial having been heard, considered and denied by this Court, now, therefore, upon motion of Gordon & Easterday, attorneys for the plaintiffs, it is

CONSIDERED, ORDERED and ADJUDGED that the plaintiffs J. A. Hoshor and Edna R. Hoshor, husband and wife, do have and recover judgment against the Sunset Telephone and Telegraph Company, a corporation, in the sum of Thirty-seven Hundred and [17] Fifty Dollars (\$3750.00) damages, together with the sum of Seventy-five and 75/100 Dollars (\$75.75) costs as taxed herein,

amounting in the aggregate in the sum of Thirty-eight Hundred Twenty-five and 75.100 Dollars (\$3825.75); to all of which defendant excepts and its exception is allowed. It is further

ORDERED that the February, 1917, term of this court is hereby continued and extended for a period of sixty days from the date hereof for all purposes of the above cause.

Done in open court this 20th day of August, 1917.

EDWARD E. CUSHMAN,
Judge.

(Filed August 20, 1917.) [18]

Stipulation Regarding Transcript of Record.

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN the respective parties by their respective attorneys herein, that the transcript to be prepared by the clerk of this court for the Circuit Court of Appeals for the Ninth Circuit, may have omitted therefrom the following:

The original complaint.

The original summons and return of service.

The demurrer to original complaint.

Order of Court on demurrer.

Petition for removal.

All captions, except the caption to the amended complaint; all endorsements, file-marks, verifications and acceptances of service on the pleadings, stipulations and orders.

Dated September 29, A. D. 1917.

GORDON & EASTERDAY,
Attorneys for Plaintiffs.

BATES & PETERSON,
Attorneys for Defendant.

(Filed October 8, 1917.) [19]

**Stipulation to Forward Original Exhibits to Circuit
Court of Appeals.**

IT IS STIPULATED that the original exhibits introduced in evidence in the trial of this cause, or substituted copies therefor, may be attached to the bill of exceptions and transmitted to the Circuit Court of Appeals for the Ninth Circuit, in lieu of copies to be made by the clerk.

Dated September 29, A. D. 1917.

GORDON & EASTERDAY,
Attorneys for Plaintiffs.

BATES & PETERSON,
Attorneys for Defendant.

(Filed October 8, 1917.) [20]

**Order Directing Original Exhibits Instead of Copies
Forwarded Circuit Court of Appeals.**

Now on this 6th day of October, A. D. 1917, on stipulation of the respective parties, through their attorneys,—

IT IS ORDERED that the clerk of this court attach the original exhibits introduced in evidence in the trial of this cause to the Bill of Exceptions, and transmit them to the United States Circuit Court

of Appeals for the Ninth Circuit, in lieu of copies.

EDWARD E. CUSHMAN,
Judge.

(Filed October 8, 1917.) [21]

Stipulation Regarding Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED between the plaintiffs and the defendants by their respective counsel that Plaintiffs' Exhibit 1, being the iron rod and guy wire introduced in evidence herein, and Defendant's Exhibits B-1 and B-2, being maps of the Sixth Avenue pole line, introduced in evidence herein, are not essential or necessary to the hearing in the Circuit Court of Appeals, and the presence of said exhibits will be of no assistance to said Circuit Court of Appeals in the determination of an appeal herein.

IT IS FURTHER STIPULATED that said exhibits need not be made a part of the record herein, and need not be transmitted to the Circuit Court of Appeals.

IT IS FURTHER STIPULATED that the order heretofore entered herein directing that original exhibits be transmitted to the Circuit Court of Appeals may be vacated and set aside, in so far as the foregoing exhibits are concerned.

Dated, Tacoma, Washington, October 25th, A. D. 1917.

GORDON & EASTERDAY,
Attorneys for Plaintiffs.

BATES & PETERSON,
Attorneys for Defendant.

(Filed October 26, 1917.) [22]

**Order Concerning Transmission of Original Exhibits
to Circuit Court of Appeals.**

Plaintiff and defendant having filed a written stipulation herein to effect that Plaintiffs' Exhibit 1, and Defendant's Exhibit B-1 and B-2 are not necessary or essential to a hearing in the Circuit Court of Appeals, and that the same need not be transmitted with the record in this cause,—

IT IS BY THE COURT ORDERED that Plaintiffs' Exhibit 1, being an iron rod and guy wire, and Defendants' Exhibit B-1 and B-2, being maps of a certain pole line, need not be made a part of the record herein, and that said exhibits need not be transmitted to the Circuit Court of Appeals.

IT IS FURTHER ORDERED that the order directing the transmission of said original exhibits to the Circuit Court of Appeals be, and the same is hereby vacated and set aside, in so far as the foregoing exhibits are concerned.

Dated October 26th, A. D. 1917.

EDWARD E. CUSHMAN,
Judge.

(Filed October 26, 1917.) [23]

Journal Order Extending Term.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 28th day of June, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly

taken and correctly copied from the journal of said court, to wit:

“Upon motion of Chas. T. Peterson, it is ordered that the entry of judgment be stayed until Tuesday, July 3, 1917, and the present term of court extended to that time for this purpose.” [24]

Order Extending Term.

Upon application of defendant it is by the Court ordered that the February, 1917, term of this court be, and the same is hereby continued and extended for a period of sixty days for all purposes of the above cause.

EDWARD E. CUSHMAN,
Judge.

(Filed June 29, 1917.) [25]

Order Extending Time to and Including September 5, 1917, to Prepare and Serve Bill of Exceptions.

By consent of parties it is ORDERED that the time within which the defendant may prepare and serve a bill of exceptions in the above-entitled case be, and the same is hereby extended to and including September 5th, A. D. 1917.

Dated, July 20th, A. D. 1917.

EDWARD E. CUSHMAN,
Judge.

(Filed July 20, 1917.) [26]

Statement of Facts and Bill of Exceptions.

BE IT REMEMBERED, That heretofore, on the 26th day of June, 1917, the above-entitled cause came on regularly for trial before Honorable E. E. Cushman, Judge of the above-entitled court sitting with a jury, plaintiffs appearing with M. J. Gordon and J. H. Easterday, their attorneys, and defendant appearing with Charles O. Bates and Charles T. Peterson, its attorneys, the jury having been duly empaneled and sworn to try the cause, counsel for plaintiffs having stated to the jury the facts which plaintiffs expected to prove on the trial thereof, and defendant reserving its opening statement, the following proceedings were had and done:

Testimony of Edna R. Hoshor, One of the Plaintiffs.

EDNA R. HOSHOR, one of the plaintiffs, called as a witness in plaintiff's behalf being duly sworn, testified as follows:

My name is Edna R. Hoshor. I am one of the plaintiffs in this action, and am thirty years old. In September, 1913, we lived at the end of Sixth Avenue. My husband and I had a store there and were running the postoffice. We had a telephone in our place of business belonging to the defendant.

In September of that year I was going out for a walk one evening with my mother and my little girl, who was two years old. We walked up over Sixth Avenue; I was wheeling the buggy when an automobile came passed from the opposite direction to which we were walking. It was running fast, and

(Testimony of Edna R. Hoshor.)

we got off the planking with the buggy to avoid the jar of the automobile. When I got off the planking I stopped to see if the baby had *his* bottle all right, and while I was leaning over the buggy something happened. The [27] next thing I remembered they were holding me up. It was between 8:30 and 9:00 o'clock in the evening, and was not very light. When I regained consciousness I was in terrible pain mostly in my back, my head, my shoulders and my groin, and between my shoulder blades. I guess my back was hurting the worse. My husband, my mother and child, and a Mr. Dunton who runs the ostrich farm were present. I was taken home where I was confined to my bed for about two weeks. I was confined to my home about a month, receiving medical treatment. Previous to that time I was in good health, weighing about one hundred and thirty or one hundred and thirty-five pounds. After I was able to get out of the house I could not hardly stand up. I had to either lie or sit down most of the time. Before the injury I had done by own housework, but since the injury I have not been able to do much. Even yet I cannot do my housework. After the injury I went down to ninety-five pounds. That was, I think, about two or three weeks afterward.

(Transcript, pp. 3-15.)

Testimony of J. A. Hoshor, One of the Plaintiffs.

J. A. HOSHOR, one of the plaintiffs, called as a witness in plaintiffs' behalf, being duly sworn, testified as follows:

(Testimony of J. A. Hoshor.)

I am one of the plaintiffs in this case, the husband of Mrs. Hoshor, who just testified. In September, 1913, we lived at the end of the Sixth Avenue car-line, on Titlow Beach. There were a line of poles on the right hand, or north side of Sixth Avenue at that time, which were strung eight telephone wires of the defendant Sunset Telephone and Telegraph Company.

On the evening of September 18th, about eight o'clock, just dusk, Mrs. Hoshor, Mrs. Graham, her mother, and our little girl were going out for a walk. Mrs. Hoshor was wheeling the baby in the baby carriage. At the time the accident happened Mrs. Graham and the little girl were about half a block ahead, and Mrs. Hoshor and I [28] were together. When we reached the point right opposite the ostrich farm an automobile came along. We stepped off the planking on the south side of Sixth Avenue and Mrs. Hoshor stopped, and I went ahead a few steps. As the automobile came along I heard a noise, and looked around to see if she was coming. She was laying in a heap, seemed to be just falling over the baby buggy, and the baby buggy was tipped over. I went back and picked her and the baby up. Just then I saw Mr. Dunton coming out of his door upstairs. He had a flashlight and I called to him. Mrs. Hoshor was unconscious at the time, and when I looked around I saw a big rod about ten feet long, and a wire alongside of it; they were lying right alongside of her. Before the accident this rod and wire was hung up over the street attached to a tele-

(Testimony of J. A. Hoshor.)

phone pole on the north side of the street by the garage at the ostrich farm, and the wire ran across the street to a large stump on the southerly side of Sixth Avenue. The telephone pole was about forty feet high, and the wire was fastened to the top. It was about 100 feet from the top of the pole to the top of the stump, and the wire ran down from the top of the pole to about twenty feet south of the southerly side of Sixth Avenue, where it was fastened into the iron rod, and then one wire was fastened on the other end of the iron rod, and ran over about twenty-five feet and was wrapped around the top of the cedar stump. The cedar stump was about eleven feet high, and about four feet in diameter at the base. The wire and rod had been fastened in this manner for about a year. When we got Mrs. Hoshor home she had a big lump on her head, and a bruise on the left side, and on her left shoulder, which were black and blue. She was also bruised on the right side of her groin, and was considerably swollen on her back. She was in great pain and hardly knew what she was doing for several hours afterward.

There had been no change in this guy wire during the year as near as I could observe. [29]

It was admitted that Sixth Avenue was a public and generally traveled street of the city of Tacoma. Sixth Avenue at the place where the accident happened is about one hundred feet wide, and the pole to which the wire is attached is in the street right near the edge of the planking. The defendant fur-

(Testimony of J. A. Hoshor.)

nished me with telephone service from wires which were on these poles.

(Transcript, pp. 15-40.)

Testimony of Edward Miles Dunton, for Plaintiffs.

EDWARD MILES DUNTON, a witness called in plaintiffs' behalf, being duly sworn, testified as follows:

In 1913 I was running the ostrich farm at the end of Sixth Avenue on Titlow's Beach. There was a pole line on the north side of Sixth Avenue. I remember the telephone pole connected by a guy wire running across the street. One evening in September, 1913, I was sitting up in my residence and heard a noise; I thought some animal was after the ostriches and grabbed an ever-ready searchlight and ran out and flashed it across the farm. While I was doing this I heard someone call me across the street and ask me to come right away. I went up there and saw Mr. and Mrs. Hoshor and the baby and Mr. Hoshor's mother-in-law, Mrs. Graham, there. Mrs. Hoshor was lying down on the planking right close to it. She seemed to be unconscious for a moment. I assisted Mr. Hoshor to take her to their home, a distance of about three hundred yards. When I reached the place where Mrs. Hoshor was lying on the ground there was a guy wire down; the one that had been suspended across the street. Exhibit 1 is the wire and rod I refer to. A wire was fastened to the top of the pole which stood on the north side of the street, and ran down across the street and

(Testimony of Edward Miles Dunton.)

attached to the end of the rod, and then one wire was attached to the other end of the rod and around the top of a big cedar stump. The wire had been there fully [30] eleven months before Mrs. Hoshor got hurt. The rod was suspended on the southerly side of the street, and partially over the planking. I did not look at the wire to learn whether it had been broken or not.

(Transcript, 40-49.)

Testimony of Emma E. Graham, for Plaintiffs.

EMMA E. GRAHAM, a witness called in plaintiff's behalf, being duly sworn, testified as follows:

I am Mrs. Hoshor's mother, and am a nurse by occupation. I recall Mrs. Hoshor receiving an injury on Sixth Avenue in September, 1913. Mr. and Mrs. Hoshor and the little girl and I went out for a walk up Sixth Avenue. The little girl and I were about half a block ahead of Mr. and Mrs. Hoshor. Mrs. Hoshor was wheeling the baby in a baby carriage. I heard a noise and looked around, and saw Mr. Dunton running with a flashlight. I went back as fast as I could, and found Mrs. Hoshor lying down with the buggy, and that wire, which was not there when I and the little girl went along, had fallen down and had evidently struck Mrs. Hoshor and the front of the baby buggy. Mrs. Hoshor seemed to be unconscious. We took her home and put her to bed. Her back was very red and swollen. She complained terribly about it.

(Transcript, pp. 49-55.)

Testimony of L. C. Cover, for Plaintiffs.

L. C. COVER, a witness called in plaintiffs' behalf, being duly sworn, testified as follows:

I am, and in September, 1913, was, United States Weather Observer. As shown by my official records the condition of the weather between eight and nine o'clock on the evening of [31] September 8th, at Tacoma, Washington, was as follows:

Partially cloudy; temperature 59; wind blowing north 7 miles per hour, no rain.

(Transcript, pp. 55-56.)

There was other testimony going to the nature and extent of plaintiff's injuries, but as such testimony has no relation to the exception claimed, it is omitted.

PLAINTIFFS REST.

DEFENDANT'S CASE.

Testimony of Norton L. Taylor, for Defendant.

NORTON L. TAYLOR, a witness called in defendant's behalf, being duly sworn, testified as follows:

I am Assistant Engineer of the Light Department of the city of Tacoma, and have occupied that position for eight or nine years. I am the custodian of the records of the city of Tacoma showing the ownership of all poles and pole lines, and particularly the pole line on Sixth Avenue. The official record which I have shows that all the poles on the north side of Sixth Avenue, from the city to Titlow's Beach, are owned by the city of Tacoma.

(Testimony of Norton L. Taylor.)

It was agreed between plaintiffs and defendant that the guy line in question was attached to a pole No. 12,386.

(Transcript, p. 59.)

Witness further testified, pole No. 12,386 is owned by the city of Tacoma. Defendant's Identification A, is a form permanently recording information as to wires, location and time every pole has been set. We are supposed to have similar cards for every pole owned by the city of Tacoma, but I am sure we do have for this particular Sixth Avenue line. There are one hundred and twenty [32] poles in that line, all owned by the city of Tacoma.

Whereupon Exhibit "A" was offered and received in evidence without objection.

(Transcript, p. 60.)

Defendant's Exhibits B-1 and B-2, being maps showing pole lines of the city were offered and received in evidence without objection.

Pole No. 12,386 was set in June, 1911; a transmission line of the city, consisting of two heavy wires is carried on the top of the pole, and eight wires of the telephone company on the lower cross-arm. The pole line is within the street limits.

(Transcript, pp. 58-63.)

Testimony of James P. Dunphy, for Defendant.

JAMES P. DUNPHY, a witness called in defendant's behalf, being duly sworn, testified as follows:

In September, 1913, I was District Superintendent of the Sunset Telephone & Telegraph Company. I

(Testimony of James P. Dunphy.)

supervised the maintenance and construction of the company's plant, among other places at Tacoma. I am acquainted with the pole line on Sixth Avenue of which the pole and guy wire in question are a part. It was not built, owned or maintained by defendant. We have one cross-arm on the pole line carrying eight wires. That arm was put on by the telephone company. We have no arrangement or agreement with the city about placing our lines on its poles, except a sort of a reciprocity agreement, simply a matter of trading privileges on each other's poles. They have wires on our poles where convenient, and we have wires on their poles where convenient. The city maintains and keeps its pole lines in repair, and we maintain and keep our pole lines up. That was the arrangement with reference to the wires on [33] this particular pole line. In September, 1913, we were operating our telephones to Titlow's Beach by using the pole line in question. The telephone company, however, has never taken any part in or done anything toward the maintenance of the pole line, except to maintain its own circuit of wires. Our men sometimes go up the poles where they have occasion to place or repair our wires. The city has nothing to do with the maintenance of our wires, which are on its poles. If there was a break in one of our circuits, making it necessary for someone to go up a pole, one of our men would go up.

(Transcript, pp. 63-67.)

Testimony of A. B. Taylor, for Defendant.

A. B. TAYLOR, a witness called in defendant's behalf, being duly sworn, testified as follows:

I am, and in September, 1913, was, claim agent for the city of Tacoma. I investigated the claim made by Mrs. Hoshor for injuries claimed to have been suffered by her on the night of September 18th, 1913. I went out to pole No. 12,386 with Mr. Perkins, of the telephone company, and two city linemen. I took the line and rod, Exhibit 1, and fastened one wire to the top of the pole, and took the other end of the wire and drew it tight about the cedar stump, drawing it as tight as three of us could pull it. We released it suddenly to see how far the rod would go toward the plank walk, or the street on Sixth Avenue. We did this two or three times. The rod was suspended about fifteen feet high, and when we let it loose suddenly it would swing toward the road from forty-three to forty-five feet. We measured the distance from the planking to the end of the rod and found it to be substantially twenty feet.

(Transcript, pp. 67-74.)

Testimony of S. V. Peterson, for Defendant.

S. V. PETERSON, a witness called in defendant's [34] behalf, being duly sworn, testified as follows:

I am line foreman for the city of Tacoma. I helped construct the Sixth Avenue pole line when it was built in 1911. Pole No. 12,386 was guyed from a wire to the top of the pole running across to the south side of Sixth Avenue, and anchored to a dead

(Testimony of S. V. Peterson.)

man five feet long buried about six feet in the ground, a regular standard guy. The dead man was of cedar wood from ten to fourteen inches in diameter, and five feet long, a hole bored in the middle, and a rod put through with a washer and nut on it, and then tightened up. I do not know when the guy wire was removed from the dead man and connected up with the stump. After September, 1913, I went out and took the guy wire down from the pole. I assisted in conducting the experiment testified to by Mr. Taylor. It must have been six or seven feet from where the rod fell to the planking. I have stretched many guy wires in my experience, and in making the experiment we stretched the wire about the way it is stretched in regular work.

(Transcript, pp. 74-81.)

Testimony of Frank Richards, for Defendant.

FRANK RICHARDS, a witness called in defendant's behalf, being duly sworn, testified as follows:

In September, 1913, I was line foreman for the city of Tacoma. I constructed the Sixth Avenue pole line for the city. Pole No. 12,386 was guyed as stated by Mr. Peterson. I was out on the line with Mr. Taylor when the experiment was conducted. I should judge that the rod struck the ground about 10 feet south of the plank roadway. I do not know when the guy wire was detached from the anchor, or dead man, and transferred to the stump. At the present time the top of pole No. 12,386 leans away from the plank road.

(Transcript, pp. 81-84.) [35]

Testimony of B. W. Collins, for Defendant.

B. W. COLLINS, a witness called in defendant's behalf, being duly sworn, testified as follows:

I am an electrical engineer, and have followed that business for nearly twenty years; and as such I am familiar with electrical construction, and with the construction of pole and transmission lines.

In September, 1913, I was Superintendent of Electrical Works for the city of Tacoma, and had been so engaged since May, 1910. I issued the orders for and planned the type of construction of the Sixth Avenue pole line for the city of Tacoma. The line is what is known as a standard forty foot pole line. Poles forty feet in length, with tops of standard diameter not less than eight or nine inches at the top set six feet in the ground, and guyed at the curves, or corners where the curves exceed fifteen degrees or more. The guying on small curves is done with a guy wire which is fastened to anchor rods, which are in turn fastened to what is called a dead man five or six feet in the ground, depending upon the nature of the earth. I inspected this line after it was constructed, and it was a standard up-to-date approved construction, such as is generally made of such lines. The last time I personally inspected it was immediately after it was constructed. The city of Tacoma paid for the construction and maintained it down to the time I left which was in September, 1916, making all the repairs which were made. At the time the line was constructed it was contemplated that the telephone wires would be placed on it, and it was con-

(Testimony of B. W. Collins.)

structed by the city with that usage in view. It was deemed essential, considering the use of the pole line, to attach these guy wires to dead men such as I have described. I had no knowledge of the [36] change made in the guy on pole No. 12,386, and of its becoming detached. It evidently was detached from the dead man, and attached to the stump by some third party unauthorized so to do. The inspection of these lines is left to subordinates, and when this condition is found it is supposed to be corrected. All of the guy wires on the particular curve where pole No. 12,386 is are guyed to dead men.

(Transcript, pp. 85-90.)

**Testimony of E. E. Perkins and Dr. James R. Yocom,
for Defendant.**

Mr. E. E. PERKINS and Dr. JAMES R. YOCOM were called as witnesses for defendant, but their testimony had no relation to the exceptions claimed.

DEFENDANT RESTS. [37]

REBUTTAL EVIDENCE.

**Testimony of J. A. Hoshor, for Plaintiffs (In
Rebuttal).**

J. A. HOSHOR, being called in rebuttal, testified further:

Pole No. 12,386 is drawn out, and leans to the south. It is about the same now as it was in December, 1914, when Mr. Taylor conducted his experiment. At the time of the accident the pole was about perpendicular.

(Transcript, pp. 102-104.)

Motion for Directed Verdict.

Thereupon the following took place:

“Mr. BATES.—We move at this time, if the Court please, the evidence all being in, that the Court direct the jury to bring in a verdict for the defendant, for the reason that the evidence wholly fails to establish the cause of action set forth in the complaint, and wholly fails to give any right for a verdict in favor of the plaintiff.”

(Transcript, p. 104.)

The motion was argued by counsel for the respective parties, and at the close of the argument the Court overruled the motion, and in doing so stated as follows:

“The COURT.—The motion will be denied. It is true, that, so far as these falling pole cases that have been cited are concerned, they seem to have been employees who were hurt and the master’s duty was to furnish a safe place to work. Whereas the duty of the defendant here was, as far as the public was concerned, not to help to create a dangerous nuisance. I cannot see but what it comes to nearly the same thing in so far as the *the* protection of employees and the protection of pedestrians on the highways are concerned.

In so far as the sewer case is concerned, you couldn’t expect everyone to build his own sewer in the street. He would not be allowed to do it.

In so far as poles are concerned, that is, poles used by two parties, one of which owns the pole, it seems to me that various complications might arise, in so

far as the operation of the wires are concerned, like these [38] two cited cases. Take the case where the glass insulator fell from the Western Union wire. In so far as the separate wires are concerned, the party who has these wires owns them and uses them. There is a separate responsibility, a separate duty and separate liability in so far as their causing damage is concerned. This applies to the Western Union Company's case and also to the case where the defectively insulated wire was put up in the tree.

Each owner and user would be bound to see that his wire was kept safe, but, so far as the pole is concerned and the guy wire to support it, they are instrumentalities of the owner and user of both sets of wires.

The pole would have stood there is carrying no wires on it without a guy wire. Being on a curve, it is quite evident that the different sets of wires would have a tendency to pull the pole over. The guy wire, the pole and the wires the pole carried are all a part of one instrumentality for the purpose of holding the wires up off the ground out of the way, or help to that end.

The reasoning of the judge in the case where he held that, if the defendant company doesn't have the necessary control to inspect and keep in a reasonably safe condition poles, it shouldn't enter upon and further continually and continuously burden those poles with its wires, unless it reserves that right for itself, appeals to me as sound law.

Regarding the rule of a number of cases cited where the defect in the roadbed, or street adjacent

to the tracks, where one of the companies owns the tracks and a licensee uses them, it appears to me that they are not in point. If they had been cases where there was a train toppled over on account of that defect and some one had been injured, the case would have been in point.

But merely where some one passes over the road-bed, if there are holes and somebody steps into a hole and gets hurt, after the train goes by and no one claims that the hole was created by the use made by the licensee, it is not in point. [39]

Regarding the case of the bill poster. If anybody painted a sign on a board or posted a sign on it, there isn't anybody who would reasonably argue that that would make the board appreciably weaker or more likely to fall. If it had been a case where the bill poster loosened the sign while putting his sign on it, it would be more nearly in point."

(Trans., pp. 105-107.)

Defendant requested an exception, which the Court allowed.

Instructions.

Thereupon the case was argued to the jury by counsel for the respective parties, and the Court instructed the jury, as follows:

"Gentlemen of the jury, you will take out with you to your jury-room the plaintiffs' complaint which has been filed, and the defendant's answer, the pleadings in the case. The arguments have already advised you about what the dispute is, and it is elaborated and set out more in detail in these pleadings, which you will take out with you.

Briefly, the plaintiff says that the defendant had the telephone line out there near the end of Sixth Avenue on the highway, that it had its wires on a pole of the city, that is, that might be the exact language of the complaint, but there is no dispute in the evidence but what this pole is a pole that the city put there; that the defendant company had its wires on that pole, and that the pole was guyed, that there was a guy wire and rod bracing the pole from the road, holding it from falling away towards the road; that while the two plaintiffs, and that while the plaintiff Mrs. Hoshor, was rightfully using this highway in walking under that guy wire, that it became loosened through the negligence of the defendant company and fell upon her and injured her. For this injury, the plaintiffs ask a verdict at your hands of \$10,000.

II.

The defendant denies that it was negligent, and denies the extent of her injury, and that she was damaged in any such amount as claimed.

III.

Those are the issues you are called upon to try, and the Court instructs you as to the law that even though the telephone wires of the defendant company may have been put upon the pole, that the city had erected there, that nevertheless, it was the duty of the defendant company to exercise ordinary care to see that pedestrians on the highway should not be injured through any instrumentalities which it was using, including this wire that was used to [40] help support its telephone wires, this guy

wire that was used to help support defendant's telephone wires. That is one of the main issues in the case, that is, whether they exercised ordinary care to prevent people using that street from being injured.

IV.

Ordinary care is defined as being such care as an ordinarily careful and prudent person would exercise under the same circumstances, and should be proportioned to the peril and danger reasonably to be apprehended from a want of proper prudence.

V.

The burden of establishing, by a fair preponderance of the evidence, the allegations made in the complaint, rests upon the plaintiff; that is, before they can recover anything it is necessary that they should establish by a fair preponderance of the evidence that this injury, if any, that the plaintiff Mrs. Hoshor sustained, happened in the same way in which they allege that it happened. They have to establish before they can recover anything by a fair preponderance of the evidence that this wire and rod fell in the manner they have described, and that the cause of its fall was the negligence of the defendant company. Unless they do establish that by a fair preponderance of the evidence, they can recover nothing.

VI.

They also have to show by a fair preponderance of the evidence the extent of the damage, and they have to show by a fair preponderance of the evidence before you can allow, say, on account of these

miscarriages of which complaint has been made, before you could allow for damage on account of an injury of that nature, they would have to show by a fair preponderance of the evidence that that injury was the direct and proximate result of the wire or rod striking her, that they claim fell upon her. The company would not be liable for all of the afflictions that she might suffer during the remainder of her life unless they were caused directly and naturally by the falling of this rod or wire.

VII.

Preponderance of the evidence means the greater weight of the evidence. That evidence preponderates which is of such a character and so appeals to your intelligence and your understanding, your reason and your experience, as to create and induce belief in your minds, and if there is a dispute in the evidence, that evidence preponderates which is so strong in those particulars as to overcome and weigh down that evidence that has been produced against it.

VIII.

Naturally, in considering the case, the first question for you in taking up this case is to determine whether the plaintiff, Mrs. Hoshor, was injured as she claims she was injured, by the falling wire or rod, and after you have determined that you will pass on to determine whether the defendant was in any way negligent, as described in the complaint, in permitting that wire to fall. If [41] you find a fair preponderance of the evidence to support these two issues in favor of the plaintiff, you will

then pass on to the question of what, if any, of the plaintiff's injuries which she has described, are by a pair preponderance of the evidence shown to have been caused by the falling of the wire or rod. And then, having determined that issue, you would then pass on to determine the amount that should be allowed the plaintiffs for these injuries which she had so directly and proximately suffered from the defendant's negligence. If you allow the plaintiffs anything, you will confine your allowance to such an amount as in your best judgment will fairly compensate them for the injuries they have so suffered as the direct and proximate result of defendant's negligence which they describe in the complaint. You will not allow anything to them on account of any sympathy you may have for them, and you will not swell our verdict against the defendant on account of any prejudice; if any, you may have against the defendant itself, or because of the fact that it is a corporation. In determining the amount, if you allow the plaintiffs anything, you may take into account the pain or suffering the plaintiff, Mrs. Hoshor, may have endured by impairment to her ability to care for herself and her children, but before you would allow anything on account of any future inconvenience that she may suffer, it must appear with reasonable certainty that there will be future impairment or inconvenience as to her.

IX.

You are in this case, as in every other case where questions of fact are submitted to a jury for determination, the sole and exclusive judges of every question of fact in the case, the weight of the evi-

dence and the credibility of the witnesses. In weighing the evidence and determining the amount of credit that should be accorded each of the witnesses who have come before you and testified, you will take into account their appearance and demeanor, and the manner in which they gave their testimony, whether it was such as to carry conviction to you and create in your mind the belief that they were trying to tell you exactly what they knew, neither adding to it or taking from it, or whether any of them impressed you as being reluctant, keeping back something that they know, trying to keep from telling you all they knew, or whether, on the other hand, some of them may not have impressed you with being too willing, running along and constantly trying to get something into the case that nobody was asking about. Also you will take into account the situation each witness was in in regard to the transactions about which the witness testified as enabling that witness to know exactly what the truth was, as one witness may be much better situated to know the exact facts than another who was equally honest. You will take into consideration the testimony of each witness by itself, whether it appears probable, reasonable, complete, whether it is corroborated by other evidence in the case, or whether contradicted by other evidence; also you will take into account the interest any witness may have in the case, either as shown by the manner in which he testified or his relation to the case, and both plaintiffs having testified in their own behalf, you will take into account the same tests in weighing

their testimony as you apply to the testimony of other witnesses, including their natural interest in the result of the verdict.

Mr. GORDON.—(At the close of the Court's Instructions.) No exceptions. [42]

Mr. BATES.—Defendant excepts to that part of the Court's instruction in which it tells the jury that even though the wires of the telephone company were on the city poles, it was nevertheless the duty of the telephone company to use ordinary care to see that pedestrians were not injured by any of the instrumentalities used by the telephone company, including the poles, wires, and guy rod.

The COURT.—I did not include the pole. I included the wire.

Mr. BATES.—Well, I will take that part out of the exception.

The COURT.—Exception allowed.

The Court further instructed the jury as follows:

The COURT.—Gentlemen of the jury; the Court submits two forms of verdict, one finding generally for the defendant, which form would be completed, merely by the signature of your foreman; if you find for the defendant, and the other one, finding for the plaintiffs, has a blank left in it for the insertion of the amount at which you assess their recovery, if you find for the plaintiff. When you have agreed, you will cause whichever of these forms which fit your verdict to be completed, apprise the bailiff of the fact that you have agreed, and return into court.

Juror A. M. GODDARD.—Do I understand that the question of the liability of the Sunset people does

not enter into the discussion of the jury?

The COURT.—It certainly does. It is the main dispute.

Juror GODDARD.—I mean as between the Pacific Telephone & Telegraph Company and the city? In other words, can the jury question as to whether the Pacific Company were at all liable in the matter?

The COURT.—I told you you would have to determine whether they exercised ordinary care.

(Transcript, pp. 107–113.) [43]

Stipulation Re Bill of Exceptions and Statement of Facts, etc.

IT IS STIPULATED AND AGREED by and between the plaintiffs by their attorneys, M. J. Gordon and J. H. Easterday, and the defendant by its attorneys, Charles O. Bates and Charles T. Peterson, that the foregoing Bill of Exceptions and Statement of Facts contains all of the material facts and evidence introduced at the trial of said cause by and on behalf of the respective parties thereto, together with a statement of all motions, objections and rulings thereon and exceptions taken thereto by the respective parties occurring during the trial of said cause, and that the same may be settled and certified as the Bill of Exceptions herein.

Dated September 28th, A. D. 1917.

GORDON & EASTERDAY,

Attorneys for Plaintiffs, J. A. Hoshor and Edna R. Hoshor, His Wife.

BATES & PETERSON,

Attorneys for Defendant, Sunset Telephone and Telegraph Company, a Corporation. [44]

**Certificate of District Judge to Bill of Exceptions,
etc.**

United States of America,
Western District of Washington,
Southern Division,—ss.

I, E. E. Cushman, the undersigned Judge of the District Court of the United States, Ninth Judicial Circuit, Western District of Washington, Southern Division, before whom the above-entitled cause was tried, do hereby certify that the matters and proceedings set forth in the foregoing Bill of Exceptions are all of the matters and things which occurred at the trial of said cause, and the same are hereby made a part of the record herein.

I further certify that said Bill of Exceptions contains all of the material facts and evidence introduced at the trial of said cause by and on behalf of the respective parties thereto, together with a statement of all motions, objections and rulings thereon, and exceptions taken thereto by the respective parties occurring in the trial of said cause, and the same is hereby made a part of the record in said cause, together with the exhibits introduced by the respective parties upon said trial, which will be filed with the clerk of this court as directed by an order heretofore made, and the Court hereby settled and allows said Bill of Exceptions in the presence of counsel for the respective parties hereto, they being present and concurring therein.

IN WITNESS WHEREOF I have hereunto set my hand this 6th day of September, A. D. 1917, at Tacoma, Washington, in said District.

EDWARD E. CUSHMAN,
Judge.

(Filed October 8, 1917.) [45]

**Certificate of Clerk of United States District Court
to Original Exhibits.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the papers enclosed in the envelope hereto attached are the original exhibits introduced at the trial in the case of J. A. Hoshor and Edna R. Hoshor, Husband and Wife, Plaintiffs versus Sunset Telephone and Telegraph Company, a Corporation, Defendant, No. 1752, in this court at Tacoma, on behalf of the plaintiffs and the defendant, which are required by stipulation of counsel and order of Court to be attached to the Bill of Exceptions and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of said cause, to wit:

Plaintiffs' Exhibit No. 2, Photograph.

Defendant's Exhibit "A," Pole Record of City of Tacoma.

ATTEST my hand and the seal of said District Court at Tacoma, this 29th day of October, A. D. 1917.

[Seal]

FRANK L. CROSBY,
Clerk.

By F. M. Harshberger,
Deputy Clerk. [46]

Plaintiffs' Exhibit No. 2.



[Endorsed]: No. 1752. United States District Court, Western District of Washington. J. A. Hoshor et ux. vs. Sunset Tel. & Tel. Co. Plaintiff's Exhibit No. 2.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 26, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Defendant's Exhibit "A."

POLE RECORD

Department of Light & Water.

No. 12386

Location *1st S. W. of 8th Ave. Mon on No side 6 ft. air forward*

Reset
Set *6-11*

Diam. Top *9"* Kind of Ground *Sand*

Length *40'* Painted _____ Stepped _____ Butts Treated _____

ARC

Suspended
Mast Arm
Pole
Tungsten

Arm	Size Wire	Painted				Stepped				Butts Treated				Pole Owner
		1	2	3	4	1	2	3	4	1	2	3	4	
No. 1	Circuit			<i>4</i>								<i>4</i>		<i>City</i>
	Voltage			<i>2200</i>								<i>2200</i>		<i>Transformer No.</i>
Arm No. 2	Circuit													
	Voltage													
Arm No. 3	Circuit													<i>Order No.</i>
	Voltage													<i>383</i>
Arm No. 4	Circuit													
	Voltage													

Give description and location of all guys.

REMARKS:

[Endorsed]: No. 1752. United States District Court, Western District of Washington. J. A. Hoshor et ux. vs. Sunset Tel. & Tel. Co. Defendant's Exhibit "A."

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 26, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Petition for Writ of Error.

Sunset Telephone and Telegraph Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the judgment entered herein on the 20th day of August, 1917, comes now and petitions this Court for an order allowing it to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, there to correct certain errors committed to the prejudice of defendant, and which more in detail appear from the Assignments of Error filed with this petition.

Defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to said United States Circuit Court of Appeals.

CHARLES T. PETERSON,

CHARLES O. BATES,

Attorneys for Defendant.

(Filed October 8, 1917.) [47]

Assignment of Errors.

Comes now Sunset Telephone and Telegraph Company, a corporation, defendant, and assigns error in the trial, decisions, rulings, orders and judgment of the Honorable District Court in said cause, as follows:

I.

The Honorable District Court erred in denying defendant's motion, made at the close of all the testimony, to instruct the jury to bring in a verdict in defendant's behalf and against the plaintiffs, for the reason that the evidence wholly failed to establish the cause of action set forth in the complaint, and wholly failed to give any right to a verdict in plaintiffs' behalf.

(a) In holding that the evidence was sufficient to show that the transmission pole and guy line in question were an agency or instrumentality in possession of, or under the control of the defendant.

(b) In holding that there was any duty on the part of defendant to make any inspection, or to exercise any care in the maintenance of the pole or guy line in question, the falling of which is claimed to have caused plaintiffs' injuries.

(c) In holding that there was sufficient testimony to submit to the jury the question of whether or not the cedar stump to which the guy line in question was fastened was an unsafe means of securing the same.

(d) In submitting the question of defendant's negligence to the jury in view of the fact that there was no evidence that a reasonable inspection would have disclosed the defect in the fastening of the guy line, or wire, to the cedar stump in question.

[48]

(e) In refusing to rule, as a matter of law, that defendant did not exercise control, and had no right to exercise control over the pole or guy line in ques-

tion, the falling of which, it is claimed, caused plaintiffs' injuries.

(f) In failing to rule, as a matter of law, that the evidence wholly failed to show the violation or neglect on the part of defendant of any legal duty towards plaintiffs in connection with the maintenance of the pole and guy line in question.

(g) In failing to rule, at defendant's request, that the evidence was wholly insufficient on plaintiffs' theory of the case, or under any theory of law, to submit the question of defendant's negligence to the jury.

II.

The Court erred in failing and refusing to rule as a matter of law that under the uncontraverted evidence offered showing that the pole and guy line in question were owned by the city of Tacoma, that defendant was a mere licensee in the use of the pole in question, and that it did not have any control over the same, and that it was under no legal duty to inspect the same, or the guy line attached thereto, or to keep the pole or guy line in repair, and that therefore there was no evidence to justify the submission of the question of defendant's negligence in the maintenance and repair of the pole and guy line in question to the jury.

III.

The Court erred in its charge to the jury wherein it instructed the jury that even though the wires of defendant telephone company were on the city poles, and on the pole in question, it was nevertheless the duty of the telephone company to use ordinary [49]

care to see that pedestrians were not injured by any of the instrumentalities used by the telephone company, including the wires and guy rod in question, which portion of the charge was duly excepted to by defendant at the time, and before the jury retired to consider of their verdict.

WHEREFORE, defendant prays that said judgment of the Honorable District Court of the United States for the Western District of Washington, Southern Division, be reversed.

Dated this 2d day of October, A. D. 1917.

CHARLES O. BATES,

CHARLES T. PETERSON,

Attorneys for Defendant.

Office and Postoffice Address,

1107 National Realty Building,

Tacoma, Washington.

(Filed October 8, 1917.) [50]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that Sunset Telephone and Telegraph Company, a corporation, defendant herein, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, for and on behalf of said principal, are each held and firmly bound unto J. A. Hoshor and Edna R. Hoshor, husband and wife, plaintiffs herein, in the penal sum of Five Hundred Dollars, to be paid them, and each of them, their heirs, executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, and

each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 6th day of October, A. D. 1917.

Whereas, the above-named principal, Sunset Telephone and Telegraph Company, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Western District of Washington, Southern Division, rendered and entered on the 20th day of August, 1917.

NOW, THEREFORE, the condition of this obligation is such that if the above-bounden principal, Sunset Telephone and Telegraph Company, a corporation, should prosecute said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SUNSET TELEPHONE AND TELEGRAPH
COMPANY,

By CHARLES O. BATES and
CHARLES T. PETERSON,

Its Attorneys. [51]

FIDELITY & DEPOSIT COMPANY OF
MARYLAND.

[Corporation Seal] By I. C. ROWLAND,

Atty.-in-Fact.

The above bond and sufficiency of surety thereon

are hereby approved this 6th day of October, A. D. 1917.

EDWARD E. CUSHMAN,
Judge.

(Filed October 8, 1917.) [52]

Order Allowing Writ of Error.

On this 6th day of October, A. D. 1917, comes the defendant, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error on assignments of error intended to be urged by them, and praying also that a transcript of record and proceedings, upon which the judgment herein was rendered, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. That such other and further proceedings may be had that may be proper in the premises.

On consideration whereof the Court does hereby allow the writ of error upon defendant giving bond according to law, in the sum of Five Hundred Dollars, which will operate as a bond for costs.

EDWARD E. CUSHMAN,
Judge.

(Filed October 8, 1917.) [53]

Writ of Error (Copy).

UNITED STATES OF AMERICA.

The President of the United States of America, to the District Court of the United States, for the Western District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment before you, between J. A. Hoshor and Edna R. Hoshor, his wife, plaintiffs below, and defendants in error, and Sunset Telephone and Telegraph Company, a corporation, defendant below, and plaintiff in error, a manifest error hath happened to the damage of said Sunset Telephone and Telegraph Company, a corporation, we being willing that such error, if any, hath happened, should be duly corrected, and full and speedy justice done to the plaintiff in error aforesaid, on this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of such court, in the city of San Francisco, State of California, together with this writ, so that you have the same at said place before the justices aforesaid on thirty days from the date of this writ. That the record and proceedings aforesaid being inspected, said Justices of said Circuit Court of Appeals may cause further to be done therein to correct

that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 6th day of [54] October, A. D. 1917.

[Seal of U. S. Court.] FRANK L. CROSBY,
Clerk of the District Court of the United States, for
the Western District of Washington, Southern
Division.

By F. M. Harshberger,
Deputy Clerk.

The foregoing writ is hereby allowed this 6th day
of October, A. D. 1917.

EDWARD E. CUSHMAN,
Judge.

(Filed October 8, 1917.) [55]

Citation on Writ of Error (Copy).

UNITED STATES OF AMERICA—ss.

The President of the United States to J. A. Hoshor
and Edna R. Hoshor, Husband and Wife,
GREETING:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit to be holden at the city
of San Francisco, in the State of California, within
thirty (30) days from the date hereof, pursuant to
a Writ of Error duly issued and now on file in the
office of the clerk of the United States District Court
for the Western District of Washington, Southern

Division, wherein Sunset Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why so much of the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States, this 6th day of October, A. D. 1917.

EDWARD E. CUSHMAN,
United States District Judge.

(Filed October 8, 1917.) [56]

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of J. A. Hoshor and Edna R. Hoshor, Husband and Wife, Plaintiffs, versus Sunset Telephone and Telegraph Company, a Corporation, Defendant, No. 1752, in said District Court, as required by praecipe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office in said District at

Tacoma; and that the same constitute my return on the annexed Writ of Error herein.

I further certify and return that I hereto attach and herewith transmit the original Writ of Error and the original Citation; and that I am transmitting herewith, duly certified and attached to the bill of exceptions herein, the original exhibits called for in stipulation of counsel and order of Court for transmission of the same to the Circuit Court of Appeals.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 114 folios at 15¢ each	\$17.10
Certificate of Clerk to Transcript, 3 folios at 15¢ each and seal65
Certificate of Clerk to original exhibits, 2 folios at 15¢ each and seal.....	.50

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 29th day of October, A. D. 1917.

[Seal]

FRANK L. CROSBY,
Clerk.

By F. M. Harshberger,
Deputy Clerk. [57]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

J. A. HOSHOR and EDNA R. HOSHOR, Husband
and Wife,

Defendants in Error,

vs.

SUNSET TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Plaintiff in Error.

Writ of Error (Original).

United States of America.

The President of the United States of America, to
the District Court of the United States, for the
Western District of Washington, Southern Divi-
sion, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment before you, between
J. A. Hoshor and Edna R. Hoshor, his wife, plain-
tiffs below, and defendants in error, and Sunset
Telephone and Telegraph Company, a corporation,
defendant below, and plaintiff in error, a manifest
error hath happened to the damage of said Sunset
Telephone and Telegraph Company, a corporation,
we being willing that such error, if any, hath hap-
pened, should be duly corrected, and full and speedy
justice done to the plaintiff in error aforesaid, on
this behalf do command you, if judgment be therein
given, that then, under your seal, distinctly and
openly, you send the record and proceedings afore-

said, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of such court, in the city of San Francisco, State [58] of California, together with this writ, so that you have the same at said place before the justices aforesaid on thirty days from the date of this writ. That the record and proceedings aforesaid being inspected, said Justices of said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 6th day of October, A. D. 1917.

[Seal] FRANK L. CROSBY,
Clerk of the District Court of the United States,
for the Western District of Washington, Southern Division.

By F. M. Harshberger,
Deputy Clerk.

The foregoing Writ is hereby allowed this 6th day of October, A. D. 1917.

EDWARD E. CUSHMAN,
Judge.

Service of the foregoing Writ is hereby acknowledged, by receipt of a copy of same, this 6th day of October, A. D. 1917.

_____,
_____,

Attorneys for Defendants in Error. [59]

[Endorsed]: In the U. S. Circuit Court of Appeals of the United States, Ninth Judicial Circuit, District of Washington. J. A. Hoshor, et ux., Defendants in Error, vs. Sunset Tele. & Tele. Co., a Corporation, Plaintiff in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

We hereby acknowledge due and legal service upon us of the within Writ of Error at Tacoma, Washington, this 8th day of October, 1917.

GORDON & EASTERDAY,
Attorneys for _____,

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —

J. A. HOSHOR and EDNA R. HOSHOR, Husband
and Wife,

Defendants in Error,

vs.

SUNSET TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Plaintiff in Error.

Citation on Writ of Error (Original).

United States of America—ss.

The President of the United States to J. A. Hoshor
and Edna R. Hoshor, Husband and Wife,

GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the office of the clerk of the United States District Court for the Western District of Washington, Southern Division, wherein Sunset Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why so much of the judgment rendered against the said plaintiff in error as in said Writ of Error, mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States, this 6th day of October, A. D. 1917.

[Seal]

EDWARD E. CUSHMAN,
United States District Judge. [60]

[Endorsed]: In the Circuit Court of Appeals of the United States, Ninth Judicial Circuit, District of Washington. J. A. Hoshor, et ux., Defendants in Error, vs. Sunset Tele. & Tele. Co., a corporation, Plaintiff in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

We hereby acknowledge due and legal service

upon us of the within Citation at Tacoma, Washington, this 8th day of October, 1917.

GORDON & EASTERDAY,
Attorneys for Plffs.

[Endorsed]: No. 3074. United States Circuit Court of Appeals for the Ninth Circuit. Sunset Telephone and Telegraph Company, a Corporation, Plaintiff in Error, vs. J. A. Hoshor and Edna R. Hoshor, Husband and Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed November 1, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

